No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL–CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL–CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order (R. 47–51)[1] issued against respondents on December

[1] References to the printed record and to the supplemental printed record are designated "R." and "S. R.," respectively. References preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

14, 1957, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U. S. C., Secs. 151 *et seq.*), hereafter called the Act. The Board's Decision and Order (R. 47–51, S. R. 195–208) are reported in 119 N. L. R. B. Nos. 126 and 126A.[2] This Court has jurisdiction of these proceedings under Section 10 (e) of the Act, the unfair labor practices having occurred at Seattle, Washington, within this judicial circuit.

STATEMENT OF THE CASE

The Board found that the hiring provisions in the collective bargaining contract in effect between the respondent unions and the employer associations were violative of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act in that they vested the unions with exclusive control, without adequate safeguards against improper discrimination, over the recruitment and referral of employees for jobs with members of the employer associations. In addition, the Board found that Cyrus Lewis, an applicant for employment, had been discriminatorily denied referral to jobs under the hiring arrangement in violation of the same statutory provisions. Finally, the respondent local union was found to have attempted to compel Lewis to withdraw the unfair labor practice charge he had filed in this case by threats and promises relating to job opportunities, and thereby to have violated Section 8 (b) (1) (A) of the Act. The evidentiary facts upon

[2] The Board's opinion in this case was issued March 27, 1958, more than three months after entry of its decision and order, and is printed separately at S. R. 195–208.

which the foregoing findings are based may be summarized as follows:

I. The Board's findings of fact

A. The parties and their relationship

The employer associations in this case are chapters of the Associated General Contractors of America, each having a membership of persons and companies engaged in general contracting in the building and construction industry in the western part of the State of Washington (R. 9–10, S. R. 196; 184–188, 193, 211). The Seattle and Mountain Pacific Chapters [3] have their principal offices in Seattle. The members of the former are engaged primarily in building construction, and those of the latter primarily in highway and heavy construction (R. 9; 96–97). The Tacoma Chapter [4] has its office in Tacoma, but its members also sometimes receive contracts for construction work in the Seattle area (R. 9; 91–92).[5] Each of the Chapters is authorized by its

[3] The full name of the Seattle Chapter is "The Associated General Contractors of America, Seattle Chapter, Inc." The full name of the Mountain Pacific Chapter is "Mountain Pacific Chapter of the Associated General Contractors, Inc."

[4] The full name of the Tacoma Chapter is "Associated General Contractors of America, Tacoma Chapter."

[5] The members of each of the three respondent Chapters perform a substantial amount of construction work outside the State of Washington, and also for enterprises within that State whose operations have a substantial effect on interstate commerce (R. 10–11; S. R. 185–188, 193, 211–213). On the basis of such a showing as to the operations of its members, this Court affirmed the Board's exercise of jurisdiction over the Seattle Chapter in a case which, like the present case, involved the validity of the hiring arrangements then in effect between that association and respondent Local 242. *N. L. R. B.* v. *Shuck Construction Co.*, 243 F. 2d 519, 521. Accordingly, there is

membership to enter into collective bargaining agreements with labor organizations whose members are employed in the construction industry in Western Washington (R. 9–10; 78, 84, 91, 96, 97, S. R. 185, 187, 188, 190, 193, 211, 213). Customarily the Chapters negotiate such agreements jointly (R. 9–10; 79).

The two respondent Unions, hereafter called Local 242 [6] and the District Council,[7] are labor organizations with which the three respondent Chapters deal with respect to laborers and hodcarriers hired by the Chapters' members (R. 12; 80, 99). The District Council is comprised of various locals of the International Hodcarriers, including Local 242, and represents such locals in the negotiation of collective bargaining agreements covering their members (R. 12; 79, 84, 86–87, 91–92, 93, 95, 97, 178). Local 242's membership lies within the area in which the employer members of the three respondent Chapters are engaged in construction work (R. 12, 14; 84, 86–87, 91, 93, 94–95, 97, 105–107, 160, 171, 178).

B. The hiring agreement between the respondent Unions and employer Associations

On December 30, 1955, the Chapters, jointly acting for their members, executed a collective bargaining contract with the District Council covering, *inter alia,* employees working within the jurisdiction of Local

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no merit to the allegations in the petitions for review filed in this Court by the Seattle and Mountain Pacific Chapter that they are not subject to the Board's jurisdiction (R. 69, 74).

[6] International Hodcarriers, Building and Common Laborers Union of America, Local 242, AFL–CIO.

[7] Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL–CIO.

242 (R. 12; 79, 178–180). The agreement covered a two-year term and went into effect on January 1, 1956 (R. 12–13; 178).

The provisions of the contract relating to hiring were as follows (S. R. 196, R. 13; 178–179):

> (a) The recruitment of employees shall be the responsibility of the Union and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.
>
> (b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.
>
> (c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours * * * the Employer may procure workmen from other sources.

Pursuant to these terms Local 242 maintains, as it has for many years, a hiring hall to which the employer members of the respondent chapters submit requests for employees when job openings occur within Local 242's jurisdiction (R. 14; 120–121, 128–129). The employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242's hiring hall in this manner during the events in this case (S. R. 197, 206, 207; R. 105, 109–110, 137–138, 142–146, 148, 151–153, 157, 165, 168–169, 171, 174). Indeed, the terms of jobs in the building and construction industry are often short, with the result

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that Local 242's hiring hall receives a fairly constant rate of requests for employees during the peak of the building season in the late spring and summer months (S. R. 197, 206, 207; R. 101–102, 109–110, 124, 127–128, 142–146, 148, 151–153, 157, 161–162, 165, 168, 174. Applicants for jobs register with the hiring hall, and are present at the hall in the early morning hours in order that they may be dispatched as employer requests are received (R. 14; 163). Referrals are ordinarily made on a rotation basis—the applicant longest unemployed is the first dispatched—except when employers request specific individuals. In no event, however, is a non-member of Local 242 referred to a job in preference to a member (R. 14, 15; 121–122, 124, 136, 175–176, 177). Non-members are sometimes sent out on jobs but not until it has been ascertained that a member is not available (S. R. 197, R. 14–15; 121–122, 124, 128, 175–176). This practice accords with the constitution of the International Union with which Local 242 is affiliated, which requires the dispatcher at the hiring hall, a union official, to do all in his "power to procure employment for * * * [members] in preference to any and all non-union men" (R. 15; 124–126, 175, 176).

C. The discriminatory treatment of Cyrus Lewis under the provisions of the hiring agreement

Cyrus Lewis, a hod carrier for 20 years, had been dropped from membership in Local 242 in about 1950 for non-payment of dues (R. 15, S. R. 206; 129, 141–2, S. R. 213–214). On March 15, 1956, he asked for work at the hiring hall and was told that none was available (R. 16; 161, S. R. 214). During the next 7 or 8 weeks he

came back 2 or 3 times each week, to be told repeatedly that there was no work, although on many of these occasions the Local dispatched other hod carriers to jobs (R. 16; 118, 141–142, 156, 163–165, S. R. 214, 216, 221). During this period Lewis sought reinstatement in Local 242, but was told by Leo Allman, the corresponding secretary and hiring hall dispatcher for the Local, that "there weren't any jobs" and that the Local "wouldn't take any new members" (S. R. 206, R. 16, 17; 126, 141–142, 143, 144, 171–172, S. R. 215).

On May 9, 1956, Lewis applied for a job directly with a contractor who was not a Chapter member and was put to work on a job that lasted the remainder of the day (S. R. 206, R. 17–18; 138, 140, S. R. 216). Later that day, however, the business agent of Local 242 appeared at the project and, upon observing Lewis at work, threatened the contractor with a picket line unless he hired only union members (S. R. 206, R. 18; 118–120, 139, S. R. 216–217).

A few days thereafter Lewis returned to the hiring hall and once again asked Allman to dispatch him to a job. (S. R. 206, R. 18; 120, S. R. 217). Allman replied that he had heard that Lewis had filed the unfair labor practice charge herein against the union; that the union was not going to give him "a damned thing"; and that Lewis should "get out and stay out" (S. R. 206, R. 18; S. R. 217). Disregarding this rebuff, Lewis returned to the hiring hall early on May 17 and stationed himself at the dispatcher's window (S. R. 206, R. 19; 132, S. R. 217–218). Although a number of hod carriers who came in later were dispatched to jobs, Lewis was not referred (*ibid.*). During the morning,

however, Lewis learned that a request had been received from a shipyard for a hod carrier, and asked Allman for the job. At that time Lewis was the only hod carrier in the hall (R. 19; 159, 168–170, S. R. 218). Allman denied that the job was for a hod carrier, and refused to refer Lewis, but shortly thereafter a hod carrier came into the hall and Allman referred him to the shipyard (R. 19; 132, 171, S. R. 218–219).

Later that day a Board field examiner telephoned Allman at the hiring hall, stating that Lewis had complained that Local 242 was discriminating against him (R. 19–20; 119–120, S. R. 220–221). Shortly after the call, Allman told Lewis that he would dispatch Lewis but that Lewis should withdraw the unfair labor practice charge which he had filed (R. 19–20; 134–135, 156, S. R. 219). When Lewis told him that he would see what he could do about it, Allman gave him a referral to a job which lasted several days (R. 20; 142–143, 155, 157, S. R. 219).

When the job had ended Lewis returned to the hiring hall seeking further work. Allman inquired whether Lewis had withdrawn the charge (R. 20; 133–134, S. R. 221). Lewis replied in the negative, whereupon Allman turned to the union's business agent, who was also present, and remarked, "Lewis didn't do what we told him to do" (*ibid.*). The business agent responded, "the hell with him," and Allman told Lewis "You didn't go down and withdraw the charge like I told you to, so you can get out and stay out as far as I am concerned" (*ibid.*). Lewis nevertheless returned the next day, and Allman again told him that he had been dispatched on May 17 on the assumption that he would withdraw his charge, but that

the Local would not refer him again until he withdrew it (R. 20; S. R. 221).

During the ensuing weeks Lewis appeared regularly at the hiring hall but was unsuccessful in obtaining employment until June 13, when Allman, without explanation, referred him to a job that lasted about a week (R. 20; 143–145, S. R. 221). Again, on July 11, Lewis was dispatched to a job lasting nearly a month, and on August 18 Allman gave Lewis an "Official Receipt" form which served as the equivalent of a membership book for referral purposes (R. 21; 145–146, 150, 173). During this period Lewis made further attempts to rejoin Local 242, and pay the required fees and dues (R. 20–21; 147, 154). Allman, however, continued to refuse him membership unless he received a statement from the Board that Lewis had withdrawn the unfair labor practice charge. (R. 20–21; 142–143, 147–148, 173). On two occasions Allman appeared at job sites where Lewis was working, to "see if you would withdraw the case, if you want to keep working" (R. 22; 152–153, S. R. 222, 223). Allman pointed out that although other such charges had been filed against Local 242, "we have given the boys [who filed them] work and they have withdrawn the cases" (R. 22, S. R. 223). Lewis replied on these occasions that the matter was out of his hands, and that Allman should discuss the subject with Board officials R. 22–23; 152–153, S. R. 222).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded, one member dissenting, that the hiring provisions of the

contract between the respondent unions and employer associations are violative of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act. In the Board's view, the contractual control given to Local 242 in the circumstances of this case to select applicants to be referred to jobs, in the absence of any safeguards against union favoritism in the exercise of that control, falls within the statutory proscription against encouragement of union membership and coercion of applicants in the exercise of their right not to adhere to union rules or membership requirements (S. R. 197–198).[8]

In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs. The Board found that Lewis "was a clear victim of the unlawful hiring system," and that therefore all respondents were responsible for the discrimination against him (S. R. 205–206). Finally, the Board concluded, also unanimously, that Local 242 had violated Section 8 (b) (1) (A) of the Act by attempting to compel Lewis to withdraw the unfair labor practice charge in this case by threats and promises respecting job referrals (S. R. 195–196).

To remedy the foregoing violations the Board's order requires all respondents to cease and desist maintaining or giving effect to the unlawful hiring

[8] Only Local 242 was found to have violated the Act by its execution of the agreement, for it is the only respondent against whom a charge was filed within the six month limitation period from the date of execution, as required by Section 10 (b). The Board's finding as to the remaining respondents is premised on their maintaining the agreement in effect (S. R. 205).

provisions of the contract, and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. In addition, the respondent unions are required to cease and desist from causing or attempting to cause unlawful discrimination in employment. Affirmatively, the respondent employer associations and unions are required to notify one another in writing, that neither has any objection to the employment of Lewis or any other employee who is not a member of a labor organization. Further, all respondents are required to make Lewis whole for losses in wages suffered by reason of the discrimination against him, and to post appropriate notices. (R. 47–51.)

SUMMARY OF ARGUMENT

I

The Board correctly found that the exclusive hiring agreement in this case is unlawful under Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act.

A. The single issue presented with respect to the Sections 8 (a) (3) and (b) (2) findings of the Board is whether the effect of the hiring provisions of contact between respondents was "to encourage membership in any labor organization" within the meaning of Section 8 (a) (3). The remaining prerequisites to an unfair labor practice finding under these provisions—that there be a showing of "discrimination in regard to hire * * * or condition of employment," and that the Union be responsible for causing the

employer to so discriminate—are satisfied, under settled law, by the existence of an agreement between the employer and the Union providing for exclusive hiring procedures.

Encouragement of union membership results from the hiring agreement in this case, in the first instance, because Local 242 is given unrestricted authority to make job referrals on whatever basis it wishes. Job applicants may reasonably expect from this circumstance alone that employment opportunities will depend on their compliance with union policies and practices. Moreover, as employees well know, hiring halls traditionally have been operated primarily for the benefit of union members, and in the absence of effective assurances to the contrary, employees may be expected to assume that such an arrangement is intended to operate in that fashion. This is particularly true in this case, for in the building and construction industry the hiring hall and the closed shop have long been regarded as synonomous, even in the years following the 1947 amendments to the Act. Finally, preference for union members was in fact practiced in Local 242's hiring hall. From all of these circumstances, encouragement of union membership, at least in the sense of encouraging adherence to union rules and support of union activities, could reasonably be inferred from the maintenance by respondents of their hiring agreement.

The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful. Where it can be shown that employees may reason-

ably expect that referrals to jobs will be made without regard to whether they are union members or comply with union policies, there is no premise for an inference of unlawful encouragement of union membership. Accordingly, it is entirely possible for parties to hiring agreements to take appropriate steps, which are indicated in the Board's decision, in order to neutralize the improper effects the enforcement of their agreement otherwise might have on job applicants, and thereby avoid illegality altogether.

B. The hiring agreement in this case is independently violative of Sections 8 (a) (1) and (b) (1) (A) of the Act. Under these provisions, neither discrimination in hiring nor encouragement of union membership need be shown; it is enough, that enforcement of the agreement have the effect of restraining employees in their right to refrain from union activities. Such unlawful restraint is established in this case by the showing that job applicants could reasonably feel that employment opportunities depended on their good standing with Local 242. Here again, it is open to the parties to hiring agreements to eliminate the improper restraining effects on employees of their hiring procedures by giving employees effective assurances against discrimination, as specified in the Board's decision.

II

The Board's conclusion that Cyrus Lewis was discriminated against in violation of Sections 8 (a) (3) and (1) and (b) (2) and (1) (A) of the Act is established (1) by the fact that Lewis was denied job referrals pursuant to an unlawful agreement, and

(2) by the independent showing that the reason for Local 242's refusal to refer Lewis was his nonmembership in that Union. All parties to the contract are responsible for the violation as to Lewis, for they agreed in the contract to delegate full hiring authority to Local 242, and the discriminations against Lewis was effected by Local 242 within the scope of that authority.

III

Local 242 filed no exceptions to the Trial Examiner's finding that it had violated Section 8 (b) (1) (A) by threatening and making promises to Lewis respecting job referrals for the purpose of compelling him to withdraw an unfair labor practice charge filed by him against the Union. Accordingly, under Section 10 (e) of the Act, Local 242 is precluded from contesting that finding before this Court. In any event this finding is amply supported by the evidence.

ARGUMENT

I. The Board correctly found that the hiring agreement in this case is unlawful

Introductory statement.—The abolition of all forms of compulsory unionism, save for a qualified form of the union shop, was a major objective of the 1947 amendments to the Act. *Radio Officers Union* v. *N. L. R. B.,* 347 U. S. 17, 40–42; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 5–7, I Leg. Hist. 411–413.[9] Congress was fully aware, moreover, that the union-

[9] "Leg. Hist." denotes the two volume work, *Legislative History of the Labor Management Relations Act, 1947* (Gov't Print. Off., 1948).

controlled hiring hall was one of the principal devices by which compulsory union membership had been effected. Thus, Senator Taft stated on the floor of the Senate, "Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them." 93 Cong. Rec. 3836, II Leg. Hist. 1010.[10] Decisional experience shows moreover, that hiring hall arrangements like the present one have continued, irrespective of the passage of the 1947 amendments to the Act, to be used for discriminatory purposes.[11]

As the Board has pointed out in its decision (S. R. 201–202), however, the operation of a hiring hall need not inevitably involve a statutory violation, i. e., unlawful encouragement of union membership (Sections 8 (a) (3) and 8 (b) (2)), or improper restraint upon employees' freedom to refrain from adherence to union rules (Sections 8 (a) (1) and 8 (b) (1) (A)). Cf. *N. L. R. B.* v *Swinerton,* 202 F. 2d 511, 514, certiorari denied 346 U. S. 814, discussed more fully *infra,* pp. 19–21. Hiring halls can perform their useful and permissible function of providing an efficient and fair method for the recruitment of personnel without having a discriminatory or coercive effect on the employees who must utilize such halls in order to find employment. This may be accom-

[10] See also S. Rep. 105, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 412; 93 Cong. Rec. 4885, II Leg. Hist. 1420.

[11] See, e. g., the Eighteenth, Twentieth and Twenty-second Annual Reports of the Board (G. P. O. 1953, 1955, 1957), at pp. 41, 86, and 73, respectively. See also the court decisions cited *infra,* pp. 17–18.

plished, however, only where employees need not fear that their success in being referred to jobs is dependent upon compliance with the membership rules of the union which operates the hiring hall. In adjudging the lawfulness of the hiring agreement in this case, therefore, the Board's task was to "use * * * its judgment and its knowledge" to distinguish the licit from the illicit factors that inhere in union-operated hiring arrangements. *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348, quoting from *Chicago, etc. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598. We show below that the Board's analysis comports both with the statutory provisions and with the realities of hiring practices and requirements in the building and construction industry to which the agreement in this case relates.[12]

[12] The legality of hiring halls under the Act has not been comprehensively treated by the Board in its decisions prior to this case. In the majority of cases involving a hiring hall, decision has rested on the existence of discriminatory practices apart from the effect of the contract. See cases referred to in the Annual Reports at n. 11, *supra*. The dicta relating to this issue that has appeared in earlier Board cases, however, do not appear to reflect a consistent position. Compare *Hunkin-Conkey Const. Co.*, 95 N. L. R. B. 433, 435, with *The Lummus Co.*, 101 N. L. R. B. 1628, 1631, n. 8. In *National Union of Maritime Cooks and Stewards*, 90 N. L. R. B. 1099, the Board declined to find an unfair labor practice based upon a union's insistence upon a union-operated hiring agreement, but the proposed contract in that case appeared substantially to meet the requirements for safeguards against discrimination that would render it valid under the present decision. See 90 N. L. R. B. at 1101, and the discussion at pp. 28–31, *infra*.

A. The hiring hall agreement in this case falls within the proscription of Sections 8 (a) (3) and 8 (b) (2) of the Act

1. *The issue in terms of the statutory language*

Sections 8 (a) (3) and 8 (b) (2) of the Act, subject to an express qualification not material here, are designed to protect employees against compulsory unionism. The latter provision forbids unions to "coerce or attempt to cause an employer to discriminate" in violation of the Section 8 (a) (3), which in turn makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The prerequisites to a finding that these Sections have been violated, thus, are a showing (1) of discrimination respecting employment for which the employer and union are responsible, and (2) that such discrimination encourages or discourages union membership.

In accordance with these principles it is settled law that the execution and maintenance of an exclusive hiring agreement between an employer and a union which encourages union membership within the statutory meaning is violative of both Section 8 (a) (3) and (b) (2). For example, a violation of these provisions may, and frequently has been premised upon the existence of a collective bargaining agreement which requires that preference be given to union members in hiring. See, e. g., *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521 (C. A. 9); *N. L. R. B.* v. *Daboll,* 216 F. 2d 143, 145 (C. A. 9), certiorari denied, 348

U. S. 917; *N. L. R. B.* v. *Sterling Furniture Co.,* 202 F. 2d 41, 42 (C. A. 9); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B.* v. *Philadelphia Iron Works,* 211 F. 2d 937, 941 (C. A. 3). In expressly restricting employment to union members, such agreements plainly encourage union membership, and in subscribing to such agreements both the employer and union make themselves responsible under the Act. And the further requirement of Section 8 (a) (3) that there be a showing of discrimination in regard to hire or condition of employment is satisfied by the existence of the agreement itself; no evidence of an actual refusal to hire or a discharge is necessary. See cases cited *supra,* p. 17–18. This may be explained on either of two grounds. First, the existence of a contract requiring union membership, without respect to its enforcement, imposes a discriminatory "condition of em-employment" within the statutory meaning. Cf. *N. L. R. B.* v. *Local 803 Boilermakers Union,* 218 F. 2d 299, 302–303 (C. A. 3); *N. L. R. B.* v. *McGraw & Co.,* 206 F. 2d 635, 641 (C. A. 6). Secondly, non-union applicants and employees affected by such a contract may reasonably conclude that to apply for employment, or to retain their non-member status if already employed, would be a "futile gesture," and are therefore excused from testing the matter. *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 952 (C. A. 9). See also, *N. L. R. B.* v. *Swinerton,* 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Local 420, Plumbers Union,* 239 F. 2d 327, 331 (C. A. 3); *N. L. R. B.* v. *Lummus*

Co., 210 F. 2d 377, 381 (C. A. 5). In short, where the contract in question governs the terms upon which hiring shall be conducted, evidence of specific discriminatory treatment is not essential to a finding that Sections 8 (a) (3) and (b) (2) have been violated. The unfair labor practice is established if it can be shown that the hiring features of the contract "tend * * * to encourage membership in a labor organization." *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521 (C. A. 9).

From the foregoing it is apparent that the legal issue respecting the Board's Section 8 (a) (3) and (b) (2) findings in this case is a narrow one. The hiring hall operated by Local 242 was established under an agreement between the respondent unions and employer associations which provided for exclusive hiring procedures; all applicants who failed to observe them were to be denied employment. Thus, the required showings under Sections 8 (a) (3) and (b) (2) relating to union and employer responsibility and discrimination in regard to hire or condition of employment have been made.[13] The remaining question, then, is whether the impact of these procedures, in the circumstances of this case, may fairly be said to have encouraged union membership within the meaning of Section 8 (a) (3) of the Act.

2. The Board properly held that the hiring agreement between the respondents had the effect of encouraging union membership within the meaning of the Act

(a) In *N. L. R. B.* v. *Swinerton,* this Court expressed the view that the "adoption of a system of

[13] See *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 39: a "* * * refusal to hire for an available job * * * [is] clearly discriminatory."

union referral or clearance" did not of itself unlawfully encourage union membership, and that to establish a violation it was necessary to show "that the union in fact discriminated in favor of its members" 202 F. 2d at p. 514. The Court reasoned that to hold otherwise "would in practical effect shift the burden of proof" which the proponent is required to carry with respect to all elements of the violation. *Ibid.*

On its face, this statement in which other courts have expressed concurrence,[14] would require a finding that all hiring hall arrangements, including the one in this case, are valid so long as they do not expressly give preference to union members, irrespective of whether the surrounding circumstances in a particular case show that employees could reasonably construe the arrangement, to require them to forego their statutory rights. We do not believe that so sweeping a reach was intended by the Court. There can be no quarrel, of course, with the requirement that the burden of proof respecting unlawful encouragement of union membership be sustained by the proponent of the case. We believe, however, that this requirement may be satisfied, and we show below that it has been

[14] See *Eichleay* v. *N. L. R. B.*, 206 F. 2d 799, 803 (C. A. 3); *N. L. R. B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943 (C. A. 3); *Webb Construction Co.* v. *N. L. R. B.*, 196 F. 2d 841, 845 (C. A. 8); *N. L. R. B.* v. *McGraw*, 206 F. 2d 635, 640 (C. A. 6). In addition, this Court has repeated the substance of its remarks in *Swinerton* in *N. L. R. B.* v. *ILWU Local 10*, 214 F. 2d 778, 781, and *N. L. R. B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 157, certiorari denied, 348 U. S. 871.

satisfied here, by a showing that the sum of the circumstances attending the adoption and maintenance of a particular hiring hall are such that even absent a preference clause the arrangement has the forbidden effect of unlawfully encouraging union membership. Nothing stated in *Swinerton* requires the conclusion that the burden of showing a violation cannot be met in this manner. And, in counterpoint, nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance, no showing of unlawful encouragement can be made. See pp. 28–30, *infra*.

To the extent, however, that the Court in *Swinerton* meant that its statement should have a broader reach than we have attributed to it, we believe that the Court may wish to re-examine the question in the light of the considerations advanced below. These considerations were not before the Court in *Swinerton,* nor have the reasons in support of the Board's decision in this case been presented to any of the courts whose general language may be taken to suggest that a hiring hall agreement is always valid, whatever the background circumstances, so long as there is no express preference clause.

(b) In showing that the hiring hall arrangement in this case unlawfully encouraged "membership in [a] labor organization," it is well at the outset to restate the established meaning and scope of the statutory term "membership." The coverage of this phrase includes, but is not restricted to, enrolled union membership. That is, it is not a prerequisite to a violation of

Section 8 (a) (3) that the activity in question be specifically designed to encourage an employee to sign up as a union member. Rather "membership" embraces generally "participation in union activities," and adherence to union principles in order to "stay in good standing in a union." *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 40, 42. See also *N. L. R. B.* v. *Local 542, Operating Engineers,* decided May 28, 1958, 42 LRRM 2181, 2182 (C. A. 3). This comprehensive definition fulfills the Act's policy "to insulate employees' jobs from their organizational rights," for by so reading Section 8 (a) (3), an employee is enabled, under the protection of that Section "to join in or abstain from union activities without thereby affecting his job" (*Radio Officers, supra,* at pp. 40, 42). Accordingly, the hiring hall in this case falls afoul of Section 8 (a) (3) if the Board could reasonably infer that its existence and operation improperly encouraged "subservience to union activity" or conformity "with such rules and policies as unions are likely to enforce," as well as enrolled membership (*infra,* p. 27).

The effect of the hiring hall agreement in this case on job applicants in terms of encouraging their adherence to union policies and rules may be shown in a number of ways. In the first place, as the Board observed, the hiring agreement calls for a "complete and outright surrender of the normal management hiring prerogative to [the] union" (S. R. 196). Thus, the agreement states simply that "the recruitment of employees shall be the responsibility of the Union" (S. R.

196, R. 178).[15] No criteria or methods are specified by which referrals are to be made by the Union. That essential and fundamental matter, in view of the statutory rights of the employees, is left to the unilateral and uncontrolled discretion of the union operating the hiring hall—here, Local 242. Insofar as the contract is concerned, no inhibition is placed even upon preferential treatment of union members. In practical terms, job applicants are in effect advised by the hiring agreement that whether they are referred to jobs will depend solely on Local 242's disposition toward them. For Local 242, in the words of the Board is "free to pick and choose on any basis it sees fit (S. R. 198). From this circumstance alone, "it is difficult," as the Board stated (*ibid.*):

> * * * to conceive of anything that would encourage [employees'] subservience to union activity, whatever its form, more than this kind of hiring hall arrangement. Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experiences or virtues are likely to win them

[15] The further provision in the agreement permitting employers to hire from sources other than the hiring hall if the Union does not supply applicants within 48 hours of request in no practical way qualifies the exclusiveness of the Union's control over hiring. Manifestly, the contract gives notice to an applicant seeking employment from an employer bound by its provisions that the only practical way to obtain work is through the hiring hall. And, as observed by the Board, the frequency of short term hirings by the employers involved in this case places the Union in "perpetual control" over job opportunities for applicants who must, as a practical matter, return to the hiring hall at the end of each job if they are again to find work (S. R. 197, n. 2).

> jobs at the hands of AGC contracting companies. Instead their concern is and must be: what, about themselves will probably please the unions or their agents; how can they conduct themselves best to conform with such rules and policies as unions are likely to enforce; in short, how to ingratiate themselves with the union, regardless of what the employer's desires or needs might be.

Encouragement of applicants to comply with union policy and practices, moreover, does not derive alone in this case from Local 242's unfettered and unilateral control over hiring. Applicants wishing to utilize Local 242's hiring hall cannot realistically be expected to view its operation divorced from their understanding of and experience with hiring halls as they have traditionally operated. To the job seeker, an arrangement vesting plenary and arbitrary authority in a union to supply men for jobs constitutes a hiring hall in the manner that he has known halls customarily to exist and operate, at least in the absence of reliable safeguards to the contrary. And it cannot in fairness be gainsaid that union-operated hiring halls have from the time of their inception been operated primarily for the benefit of union members, and to the end that a firm discipline be exerted over employees and applicants. Certainly, this was the understanding of Congress when it enacted the 1947 amendments to the Act. See n. 10, *supra*. And as stated in a more recent Senate Report pertaining to maritime hiring halls, "the principal characteristic of the union hall * * * is that it obliges the employer to give pref-

erence in employment to union membership." [16] With respect to the control which unions, through hiring halls, have exercised over employee adherence to union policies and activities, Senator Taft pointed out during the debate on the 1947 amendments to the Act that "Such an arrangement gives the union tremendous power over the employees. * * * A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field." [17] And this Court has observed that "instances of discrimination [to enforce union policies through union control of a hiring hall are] extremely likely, if not inevitable." *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 954 (C. A. 9).

The employees affected by the hiring agreement in this case, moreover, could reasonably be expected to view the hiring hall not only in the light of the common knowledge as to the manner of its functioning, but more specifically, in the light of its established meaning in the building and construction industry. On this score there can be little doubt that the hiring

[16] S. Rep. 1827, 81st Cong., 2d Sess. (1950), p. 7.

[17] 93 Cong. Rec. 3836, II Leg. Hist. 1010. See also Joint Comm. Rep. 986, 80th Cong., 2d Sess., Part 3, p. 52, and Part 5, pp. 38–39. It is pointed out at p. 38 of Part 5 of this Report that from the time that the longshoremen's hiring hall on the west coast was established in 1934 until the date of the Report no non-union member was able to register for referral to jobs. The Report further makes clear that this is no more than to be expected from the fact that the union membership had to undergo a long struggle to win their demand for a hiring hall. The financial burden which may be incurred by unions in the operation of a hiring hall points to an additional reason for its operation to the exclusive benefit of its members.

hall and compulsory unionism are synonymous in the minds of employees in the building trades. As described in a recent study (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (U. Mich. 1956), p. 62) : [18]

> As a result of more than half a century of experience, the closed shop was firmly established in the building trades. * * * Building contractors, as well as the labor unions, had come to regard [hiring halls or referral systems] as an efficient and expeditious aid to the conduct of collective bargaining in the industry. As a result the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

There is no reason in this case to assume that the building trade employees within Local 242's jurisdiction looked upon its hiring hall as constituting anything other than a hiring hall within the accepted meaning of that institution in the building and construction industry. The agreement called for nothing else, and contained no provisions, even had the agreement been available for their inspection, that might disabuse the minds of job applicants of the natural conclusion that the operation of the hiring hall in this case was the same as that of others which had existed in

[18] See also, id, at pp. 64, 71; Bertram and Maisel, *Industrial Relations in the Construction Industry* (U. Calif., 1955), pp. 37–38, 45–47; Edelman, *Channels of Employment* (U. Ill.), p. 73; Joint Comm. Rep. 986, 80th Cong., 2d Sess., Part 1, p. 25.

the past.[19] In view of the uncontrovertible history of the nexus between the closed shop and hiring hall in this industry, we think it plain that employees could reasonably infer from the mere existence of the hiring hall that "the union will be guided in its [referral practice] by an eye towards winning compliance with a membership obligation or union fealty in some other respect" (S. R. 200).

Finally, it should not be overlooked that, notwithstanding the noncommittal language of the contract between respondents, Local 242 in fact followed the practice of favoring union members in making job referrals (*supra*, p. 6).[20] It may be assumed that job applicants were not blind to this circumstance. Local 242's actual practice could serve only to confirm the realistic assumption that employees would naturally entertain from the mere existence of its hiring hall, that conformity with Local 242 union policies was a prerequisite to job referral.

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[19] As recently as 1953, at least, Local 242's hiring hall was operated under an agreement which expressly provided for union preference. See *N. L. R. B.* v. *Shuck*, 243 F. 2d 519, 520 (C. A. 9).

[20] Such a practice is clearly violative of the Act, irrespective of the presence of nondiscriminatory contract language. See, e. g., *N. L. R. B.* v. *Local 743, Operating Engineers*, 202 F. 2d 516, 518 (C. A. 9); *N. L. R. B.* v. *Swinerton*, 202 F. 2d 511, certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Local 420, Plumbers Union*, 239 F. 2d 327, 330 (C. A. 3). In view of its more comprehensive holding respecting the hiring agreement in this case, however, the Board did not base its unfair labor practice findings or its remedial order on the discriminatory practices generally, apart from its finding and order respecting Lewis (R. 45–51, S. R. 197).

In view of all these circumstances we believe the Board could properly conclude that maintenance of the hiring agreement in this case, since it permitted "unfettered union control over all hiring" (S. R. 201), of itself encouraged employees "to join in [Local 242's] activities," if not, indeed, to become enrolled members. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 1, 42. As we have shown, nothing more is required to sustain the Section 8 (a) (3) and (b) (2) findings of the Board in this case.

(c) In view of the prevalence and importance of union referral systems in many industries, including the industry involved in this case, the Board has made clear that the vice in the hiring hall agreement between respondents is not inherent in the concept of hiring halls, and that its holding herein does not require the conclusion that all such arrangements are invalid (S. R. 201–205). Rather, the finding of invalidity here is premised solely on the deterrent effect the hiring hall in this case may have, particularly in view of the unfettered union control over the hiring process, upon the exercise by employees of their statutory rights to abstain from union activities. In the Board's view, accordingly, appropriate affirmative action by the contracting parties to neutralize the improper effects of a union hiring hall will eliminate those aspects of the system which place it afoul of the Act. Thus, hiring halls which may fairly be regarded by employees as offering them job referral opportunities based upon objective standards or criteria and wholly without reference to whether they are union members or comply with union policies and

practices cannot be said improperly to encourage union membership.[21]

Applying this principle, the Board has indicated that a hiring agreement may in itself be legitimate, even when it vests in the union the authority to refer applicants to jobs, if it explicitly provides, *inter alia* (1) that such referrals will not be based on union considerations but on objective criteria or standards, (2) that the employer retains the right to reject any applicant referred by the union, and (3) that the parties to the agreement post in appropriate places for scrutiny by job applicants "all provisions relating to the functioning of the hiring arrangement," including the above guarantees (S. R. 202–203). Satisfaction of the first of these requirements, when posted, serves to disabuse employees of the assumption that they must please the union to obtain employment. The second lessens the control of the union over the hiring function, and thereby the power to act arbitrarily toward job applicants. And by informing employees of the "provisions relating to the functioning of the hiring agreement," the third requirement puts employees on notice of the nondiscriminatory criteria or standards which the parties have agreed upon to govern referrals to jobs, and thereby gives substantive content to the guarantee against discrimination.[22] For it precludes the instant situation where "applicants for em-

[21] Cf. the statement of Senator Taft's views in S. Rep. 1827, 81st Cong., 2nd Sess. (1950), pp. 12–16.

[22] Some minimal "encouragement of union membership," within a literal meaning of that phrase, may remain from the mere fact that employees must apply for jobs through a union even if the guarantees prescribed by the Board are present. As the

ployment may not ask themselves what skills, experience or virtues are likely to win them jobs" (S. R. 198). Employers and unions who desire to operate non-discriminatory hiring halls scarcely may complain of these requirements.

The adequacy or sufficiency of the foregoing provisions under particular contracts may present close questions to be decided in the circumstances of such cases. For example, a contract providing for hiring on a rotation plan in accordance with a registration list might be proper or improper depending on whether nonmembers have access to the registration list.[23] Similarly, the types of criteria or standards permitted to govern referrals, as well as the degree of specificity required respecting the statement in the agreement of such matters, may depend on varying circumstances relating to the overall effect which the particular hiring system may have on the employees involved.

These problems, however, are not presented here. No steps of any kind were taken by the respondents

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Board observed, however, this would not be enough to warrant a finding of a violation (S. R. 204–205). The Act does not reach every activity to which its words could literally apply. The requirements established by the Board for a valid hiring hall agreement represent a reasonable line between the kind of encouragement contemplated by Section 8 (a) (3) and literal forms of encouragement that are inevitable in any number of union activities but which are not prohibited. See *infra*, n. 26.

[23] By way of illustration, the consent decree of this Court in *N. L. R. B.* v. *Pacific American Shipowners Association, et al.*, No. 13386 (1952), establishes a hiring hall specifically providing for non-discriminatory referrals from a registration list which was carefully drawn up to include all qualified employees, irrespective of their membership status. See Appendix H of the decree, pp. 3–6. It may also be noted that the decree also provides for employer authority to reject applicants (*ibid.*, p. 8).

to indicate to the employees that the hiring system upon which they depended for employment was intended to operate in any way different from the discriminatory and coercive methods they were familiar with from experience. In short, the violation here is based on the Board's conclusion, which we submit is entirely reasonable in the circumstances of this case, that the hiring agreement in question deprived employees of their statutory rights, and not on the assumption that any hiring hall is in itself unlawful.[24]

B. The hiring hall agreement in this case is independently violative of Sections 8 (a) (1) and (b) (1) (A) of the Act

Sections 8 (a) (1) and 8 (b) (1) (A) of the Act prohibit an employer and union, respectively, from restraining or coercing employees "in the exercise of the rights guaranteed in Section 7." The latter Section in turn provides, in material part, that employees have the right "to form, join or assist labor organizations * * * and to engage in other concerted activities * * * and * * * to refrain from any or all such activities * * *." Thus, unlike Sections 8 (a)

[24] See *N. L. R. B.* v. *Teamsters Union*, 225 F. 2d 343 (C. A. 8), where the Court sustained the Board's conclusion that an agreement delegating unfettered and unilateral control over seniority to a union is in itself violative of the Act because it tends to encourage membership in the union. The Court stated: "We do not have any reason to doubt the general salutariness and soundness of this * * * view of the Board on such a contract provision, in relation to the purposes of the Act and the protection of employees' freedom of choice thereunder, or any basis otherwise to regard the Board's judgment in the matter as being wrong." (p. 347). Accord: *N. L. R. B.* v *Dallas General Drivers*, Local 745, 228 F. 2d 702 (C. A. 5).

(3) and (b) (2), violations of the provisions now under consideration do not depend on a showing of discrimination in hiring or conditions of employment, or encouragement of union membership. See pp. 17–19, *supra*. All that is required to sustain the Board's Section 8 (a) (1) and (b) (1) (A) findings is that the hiring agreement in this case had the effect of restraining employees in their right "to refrain" from assisting unions or engaging in union activities. For this reason, we do not understand that this Court's remarks in the *Swinerton* case (discussed at p. 19–21, *supra*) pertaining to the lawfulness of a hiring hall agreement are relevant to the present discussion. The Court in *Swinerton* was concerned with whether the burden of proving discrimination which encourages union membership—the requirement for finding a Section 8 (a) (3) violation—is satisfied where no more is shown than an exclusive hiring agreement which does not on its face require preference of union members. See 202 F. 2d at p. 514. As stated above, the burden of proof respecting violations of Sections 8 (a) (1) and (b) (1) (A) is significantly different.

The relevant distinction was made by this Court in *N. L. R. B.* v. *Reed,* 206 F. 2d 184. The Court there declined to find violations of Section 8 (a) (3) and (b) (2) where, although discrimination was shown, it concluded that the conduct in question did not encourage union membership. The same conduct, however, was found to be violative of Sections 8 (a) (1) and (b) (1) (A), since it had the

effect of deterring the exercise of the Section 7, right to "refrain * * * from assisting a labor organization." 206 F. 2d at p. 189.[25]

We have already shown (pp. 21–28, *supra*) that the hiring agreement in this case had the effect of depriving the job applicants who were required to use the services of Local 242's hiring hall, of any meaningful freedom to ignore union rules and policies. The short of the matter is, as shown, that applicants could reasonably feel that their employment depended on their good standing with Local 242. Accordingly, the prerequisites of Section 8 (a) (1) and (b) (1) (A) findings are fully satisfied. For conduct which has the effect of adversely threatening employment opportunities traditionally has been regarded as constituting "restraint and coercion" within the meaning of Sections 8 (a) (1) and (b) (1) (A). See e. g., *Capital Service, Inc.* v. *N. L. R. B.*, 204 F. 2d 848, 853 (C. A. 9), affirmed, 347 U. S. 501. And where, as here, such restraint is brought to bear in connection with the Section 7 right to refrain from supporting union policies or joining a union, the violation is spelled out. See

[25] In view of the Court's reliance in the *Reed* case, in making its findings respecting "encouragement of membership," upon *N. L. R. B.* v. *Teamsters Union*, 196 F. 2d 1 (C. A. 8), a case subsequently reversed *sub nom Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, the correctness of the Sections 8 (a) (3) and (b) (2) findings in the *Reed* case may be open to question. This, however, does not affect the validity of the distinction made by the Court that legal components of a violation of Sections 8 (a) (1) and (b) (1) (A) differ from those constituting a violation of Sections 8 (a) (3) and (b) (2).

N. L. R. B. v. *Reed*, 206 F. 2d at 189; *N. L. R. B.* v. *Local 1423, Carpenters' Union*, 238 F. 2d 832, 837 (C. A. 5).[26]

II. Substantial evidence supports the Board's finding that Cyrus Lewis was denied job referrals in violation of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act

Cyrus Lewis, as the Board concluded, "was a clear victim of the unlawful hiring system being carried on" under the contract between respondents (S. R. 206). Lewis repeatedly requested, and on each occasion was denied, referral from Local 242's hiring hall for a period of two months before he was finally dispatched to a short term job (*supra*, pp. 6–7). Other

[26] The steps which the Board has indicated may be taken to neutralize the coercive effects of a hiring agreement like that in this case (discussed as pp. 28–31, *supra*) would of course operate to remove such an agreement from the coverage of Sections 8 (a) (1) and (b) (1) (A) as well as Sections 8 (a) (3) and (b) (2). For the invalidity of hiring contracts under all of these sections arises out of their effects on employees—whether they improperly encourage union membership (Sections 8 (a) (3) and (b) (2)), or whether they improperly restrain employees (Sections 8 (a) (1) and (b) (1) (A)). When those effects have been reasonably eliminated, the source of the unlawfulness is no longer present. The proper adjustment to be made, it may be added, between preventing inroads on Section 7 rights and giving adequate recognition to the legitimate interests of both unions and employers in arriving at workable agreements respecting such matters as hiring, is primarily a task for the Board. See, e. g., *Truck Drivers Local No. 449* v. *N. L. R. B.*, 353 U. S. 87, 96; *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; *N. L. R. B.* v. *United Steelworkers*, 26 U. S. L. W. 4524, June 30, 1958. As stated *supra*, pp. 28–30, we believe the line which the Board has drawn in this case between valid and invalid hiring agreements to be reasonable in all respects.

applicants were continuously sent out as employer requests came in during this time (*ibid.*). Plainly, the principle of job rotation which Local 242 ordinarily followed was not applied as far as Lewis was concerned (R. 121–122, 176). And when Lewis was finally given work, it was only as an inducement to persuade him to withdraw the unfair labor practice charge filed by him in this case (*supra,* pp. 8–9).

In short, Local 242 utilized the hiring agreement between respondents, which conditioned access to jobs on dispatch from the hiring hall, to preclude Lewis from employment opportunities. This agreement, however, was unlawful. And it is settled law that such discrimination pursuant to an unlawful hiring agreement is violative of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act. See, e. g., *N. L. R. B.* v. *Daboll,* 216 F. 2d 143, 145 (C. A. 9), certiorari denied, 348 U. S. 917; *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 952 (C. A. 9); *N. L. R. B.* v. *Alaska Steamship Co.,* 211 F. 2d 357, 359–360 (C. A. 9); *N. L. R. B.* v. *Brotherhood of Carpenters,* decided October 9, 1958, 42 LRRM 2799, 2802 (C. A. 7); *N. L. R. B.* v. *McCloskey & Co.,* 255 F. 2d 6870–71, (C. A. 3).

Wholly apart from the hiring agreement, moreover, the evidence shows that the reason Lewis was not referred to jobs was that he had been dropped from membership in Local 242, a reason specifically made an improper basis for discrimination by the same

statutory provisions.[27] Indeed, the normal practice in Local 242's hiring hall was not to refer non-members, at least if members were available (*supra,* p. 6). Local 242's dispatcher at the hiring hall was fully aware of Lewis' non-union status; in fact, he rejected Lewis' frequent requests to be reinstated in Local 242, and continued to turn Lewis away on the pretext that there were no job openings (*supra,* pp. 7–9). Cf. *N. L. R. B.* v. *Dant & Russell,* 207 F. 2d 165, 167 (C. A. 9). Finally, openly disclosing that Lewis' lack of membership made him unacceptable to Local 242 and ineligible for referral, Local 242's business agent threatened to picket a contractor with whom Lewis obtained employment because the contractor, by hiring Lewis, had not kept "straight union men on the job" (R. 139). These circumstances amply support the conclusion that the discriminatory treatment of Lewis was attributable to his non-membership in Local 242. Cf. *N. L. R. B.* v. *Local 12, Operating Engineers,* 237 F. 2d 670, 674 (C. A. 9), certiorari denied, 353 U. S. 910.

The responsibility of Local 242 for the discrimination against Lewis is plain. It was Local 242's dispatcher, acting as a union official, who denied Lewis job referrals. The responsibility of the remaining respondents, the District Council and the three employer associations, may also easily be established. For these respondents were parties to the contract

[27] No union security agreement was shown to be in effect, nor could there have been such an agreement under the proviso to Section 8 (a) (3) that could justify the treatment accorded Lewis. Moreover, Lewis made several attempts to join Local 242 during the period he tried to use its hiring hall, but was refused membership (*supra,* pp. 7–9).

which delegated to Local 242 full and unrestricted authority to fill all jobs openings with the members of the associations. In such circumstances it is not material that the District Council and the employer associations may not have known of the particular discrimination against Lewis. Under the hiring agreement Lewis was compelled to apply for work through Local 242's hiring hall. As the Board pointed out, "Had [Lewis] gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance" (S. R. 207). In short, the parties to the contract had made Local 242 their hiring agent with respect to all jobs covered by the contract, and under conventional agency principles, they may be held responsible for the Local's conduct. *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521–523 (C. A. 9); *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 953–954 (C. A. 9). Indeed, the result would not be different even if, contrary to what we have shown, the hiring contract were valid. The agreement placed no restrictions upon Local 242's selection of applications for referral, and its discrimination in the performance of its task plainly was within the general scope of its authority so as to bind the principals on whose behalf it acted. See, *A. Cestone Co.,* 118 N. L. R. B. 669, 670, enforced *sub nom N. L. R. B.* v. *Local 138, Operating Engineers,* 254 F. 2d 958; Restatement of the Law of Agency (Am. Law Institute, 1933), Secs. 216, 229 (f), 236 and Comment (b).

Finally, it is no defense to the finding that respondents unlawfully discriminated against Lewis that the

record does not show that there were specific job openings with identified members of the employer associations on the particular occasions that Lewis presented himself at Local 242's hiring hall and requested referral. The record establishes that the various members of the respondent employer associations made frequent use of Local 242's hiring hall during the months that Lewis was discriminatorily treated (*supra,* p. 5). Indeed, they were required by the contract to use the hall exclusively with respect to the recruitment of workers on jobs within Local 242's jurisdiction. In addition, the record establishes that Lewis was improperly denied referral to many job openings of which Local 242 was notified, including jobs with the contractors involved in this case (*supra,* pp. 6–8). No further showing is necessary to support the conclusion that Lewis was the "victim * * * of the discriminatory hiring policy." *N. L. R. B.* v. *Swinerton,* 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Cantrell,* 201 F. 2d 853, 856 (C. A. 9), certiorari denied, 345 U. S. 996; *Hamm Drayage Co.,* 84 N. L. R. B. 458, enforced 185 F. 2d 1020 (C. A. 5).

III. The Board properly found that Local 242, in violation of Section 8 (b) (1) (A) of the Act, attempted to compel Lewis by threats and promises to withdraw an unfair labor practice charge

Local 242 filed no exceptions to the trial examiner's finding that it had violated Section 8 (b) (1) (A) of the Act by both threatening and making promises to Lewis respecting job referrals in order to force him to withdraw the unfair labor practice charge he had filed against the union. Accordingly, the Board, in accord-

ance with its Rules,[28] treated this finding on the assumption that any objection to it had been waived, and adopted it without further discussion of the matter (R. 45).

Under settled principles, Local 242 is foreclosed from raising any question respecting the validity of this Section 8 (b) (1) (A) finding before this Court. Thus, Section 10 (e) of the Act provides that "No objection that has not been urged before the Board, its number, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No such extraordinary circumstances are apparent here. The strictures of Section 10 (e) therefore remove the correctness of the finding under discussion from the contested issues in this case. See e. g., *N. L. R. B.* v. *District 50, U. M. W.*, 355 U. S. 453, 463–464; *N. L. R. B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C. A. 9); *N. L. R. B.* v. *Pinkerton's Agency*, 202 F. 2d 230, 233 (C. A. 9).

Putting aside the applicability of Section 10 (e), moreover, the violation found against Local 242 based on its conduct in attempting to obtain the withdrawal of the charge is clearly correct. As shown *supra*, pp. 7–8, Local 242's immediate response upon learning that Lewis had filed the charge was to tell Lewis that Local 242 was not going to give him "a damned thing," and that he should "get out and stay out"

[28] Rule 102.46 (b), 29 C. F. R. 102.46 (b), reads:

"No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding."

(*supra*, p. 8). Later, when Lewis guardedly promised to see what could be done about withdrawing the charge, he was given his first job referral (*ibid.*). Cf. *N. L. R. B.* v. *Local 12, Operating Engineers,* 237 F. 2d 670, 764 (C. A. 9). Thereafter Lewis was alternately dispatched and refused referrals, in a manner, as the trial examiner observed, resembling "a carrot-and-stick procedure" (R. 22). The hiring hall dispatcher made clear to Lewis, in applying this technique, that withdrawal of the charge would result in more frequent referrals (*supra*, pp. 8–9).

From the foregoing it is clear that Local 242 exerted its control over job opportunities to Lewis for the purpose of forcing him to withdraw the charge. Such conduct is a plain restraint upon the exercise by Lewis of his Section 7 rights, and thereby a violation of Section 8 (b) (1) (A) of the Act (see pp. 31–32, *supra*). *Textile Workers Union* (*Personal Products Co.*), 108 N. L. R. B. 743, 749, enforced in pertinent part, 227 F. 2d 409, 411 (C. A. D. C.); cf. *N. L. R. B.* v. *Knickerbocker Plastic Co.,* 218 F. 2d 917, 919–920 (C. A. 9); *N. L. R. B.* v. *St. Mary's Sewer-Pipe Co.,* 146 F. 2d 995, 996 (C. A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an em-

ployer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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